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Supreme Court, U.S.
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No. 04-1526

IN THE
SUPREME COURT OF THE UNITED STATES

LAWRENCE CALLANAN,
Petitioner,

v.

AL LUEBBERS, Superintendent,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI

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Statement of Facts

Petitioner Lawrence Callanan is currently serving a life sentence without the possibility of probation or parole on one count of murder in the first degree and a concurrent thirty-year sentence on one count of armed criminal action. Petitioner shot John Schuh four times, once in the head and three times in the abdomen, after a night of teenage parties in and around St. Louis, Missouri, on July 2, 1995. The State produced evidence that Callanan was alone with Schuh immediately prior to the murder, had an angry altercation with the victim earlier in the evening, and left the scene of the crime immediately after the murder. The state's case was based heavily on the testimony of Kara Weinstein, who was with petitioner much of the evening of the murder and dropped him off at the scene of the crime immediately prior to the murder.

Callanan was convicted after a jury trial in the Circuit Court of St. Louis County and the Missouri Court of Appeals upheld the conviction on direct appeal, *State v. Callanan*, 948 S.W.2d 678 (Mo.App. E.D. 1997). After Callanan's post-conviction relief motion was denied in the trial court, the Missouri Court of Appeals affirmed the denial of post-conviction relief. *Callanan v. State*, 19 S.W.3d 150 (Mo. App. E.D. 2000).

Callanan next filed for federal habeas relief in the United States District Court for the Eastern District of Missouri. The case was referred to Magistrate Judge Audrey G. Flessig, who recommended that the petition be denied. Pet. App. at 27. District Judge Donald Stohr concurred in Judge Flessig's conclusion and denied the petition and also denied a certificate of appealability on all of the claims in the petition. Pet. App. at 2. The United States Court of Appeals for the Eighth Circuit also denied a certificate of appealability on all of petitioner Callanan's claims. Pet. App. at 1. This petition for writ of certiorari followed.

Argument

I. Petitioner's claims for relief all look to the standard for granting a certificate of appealability

Petitioner's three substantive claims for review are based on constitutional claims in a federal habeas petition upon which the district court and the Court of Appeals denied a certificate of appealability. Pet. App. at 1, 77. Therefore, the only ground for relief properly before this Court is whether the court below erred in denying a certificate of appealability, the subject that petitioner's fourth claim.

This Court has already addressed the standard for granting a certificate of appealability. This Court held:

> A COA should issue if the applicant has "made a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), which we have interpreted to require that the "petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel,* 529 U.S., at 484, 120 S.Ct. 1595; see also *Miller-El v. Cockrell,* 537 U.S. 322, 336, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003).

Tennard v. Dretke, 124 S.Ct. 2562, 2569 (2004). The law regarding the standard for issuing a certificate of appealability is well-settled in this Court's jurisprudence. No conflict between the circuits exists on this question. This Court's discretionary review is not necessary to reiterate well-established law that this Court restated less than one year ago. Further, as respondent will show, all of petitioner's claims are meritless and the Eighth Circuit properly denied a certificate of appealability.

II. Petitioner's claim of prosecutorial misconduct

Petitioner contends in issue one of his petition that Dan Diemer, the prosecutor in this case, encouraged State's witness Kara Weinstein not to volunteer information unless she was specifically asked to do so and allowed Ms. Weinstein to present false testimony to the jury. Petitioner does not suggest that the opinions below rejecting his claim are in conflict with the rulings of any other courts of appeal or highest state courts; he merely asserts that the district court erred in applying this Court's precedent.

This claim does not merit issuance of a writ of certiorari for two reasons.

A. This claim is procedurally barred

Petitioner Callanan raised this claim in his amended post-conviction motion:

> counsel for the state permitted Ms. Weinstein to testify falsely during cross-examination that she had observed only Mr. Callanan's truck and no other vehicle departing from the scene of the homicide, despite her purported presence within view of the scene at the time that Mr. Claggett drove his automobile away and necessarily encountered her and despite counsel's knowledge that Ms. Weinstein had observed Mr. Claggett's automobile departing from the premises.

Resp. Ex. F[1] at 34. However, Callanan chose not to raise this claim on appeal to the Missouri Court of Appeals. This

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[1]All references to respondent's exhibits refer to the exhibits filed in the district court.

Court has held that in order to avoid a procedural default, "state prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process." *O'Sullivan v. Boerckel*, 526 U.S. 838, 845, 119 S.Ct. 1728, 144 L.Ed.2d 1(1999). Petitioner chose not to invoke a complete round of Missouri's appellate process. *See Sweet v. Delo*, 125 F.3d 1144, 1149 (8th Cir. 1997), *cert. denied* 523 U.S. 1010 (1998)(claims raised in a post-conviction motion but not raised on appeal are defaulted); *Anderson v. Groose*, 106 F.3d 242, 245 (8th Cir. 1997), *cert. denied* 521 U.S. 1108 (1997)(same). Petitioner therefore defaulted on this claim.

Further, petitioner alleged in his amended post-conviction motion that the prosecutor did not object to perjured testimony. Resp. Ex. F at 34. This statement necessarily implies that the prosecutor had prior knowledge of the allegedly false testimony and that petitioner Callanan knew at the time he filed his post-conviction motion that the prosecutor knew that Weinstein's testimony was false. Petitioner therefore could have alleged his claim that the prosecutor failed to disclose impeachment evidence in his post-conviction motion. As petitioner chose not to raise this claim in his post-conviction motion, he has defaulted on this claim.

Petitioner cannot overcome his default because he cannot show cause and prejudice or a fundamental miscarriage of justice. *Coleman v. Thompson*, 501 U.S. 722, 750, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). Therefore, review of this claim is procedurally barred. This Court need not grant a writ of certiorari to examine the merits of a procedurally defaulted claim.

B. Petitioner's claim would fail on its merits

Petitioner claims that the misconduct occurred when the

prosecution failed to disclose impeachment evidence for Kara Weinstein under *United States v. Bagley*, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985). This Court has ruled that the factors for determining a *Bagley* violation are that: 1) the evidence at issue must be favorable to the accused, either because it is exculpatory or because it is impeaching; 2) the evidence must have been suppressed by the state, either willfully or inadvertently; and 3) prejudice must have ensued. *Strickler v. Greene*, 527 U.S. 263, 119 S. Ct. 1936, 1948, 144 L. Ed. 2d 286 (1999). Evidence is material when "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Bagley*, 473 U.S. at 682. This legal standard is not new law, and petitioner's only contention is that the court below misapplied it.

Petitioner's claim would fail because the evidence in this case was not material and prejudicial in that a reasonable probability does not exist the results of the proceeding would not have changed if the disclosure had been made. Petitioner's argument is based on the fact that Ms. Weinstein testified that she saw only one car left the scene of the murder was crucial to the State's case and that two cars actually left immediately following the murder. However, evidence that Ronnie Claggett left the scene in his car very soon after the murders was admitted at trial. Claggett himself testified that he left the scene "a couple minutes" after the murder. Trial Tr. at 355. Timothy Harper testified that Claggett drove off in his car just after the murder. *Id.* at 385-86. Earl Tippett, a neighbor, testified that a dark red or burgundy Camero left the murder scene just after the shots.[2] *Id.* at 430. The evidence therefore was before the jury that Claggett had left the scene of the party just after the murder. Trial counsel

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[2]Ronnie Claggett was driving a "purple Camero." Resp. Ex. A at 358.

argued that fact extensively to the jury in closing argument. *Id.* at 697. In fact, trial counsel argued to the jury that based on Earl Tippett's testimony, Kara Weinstein must have been lying. *Id.* Because this evidence and this argument was already before the jury, there is no reasonable probability that the result of the trial would have changed if the prosecution had disclosed Weinstein's comment. Petitioner thus has failed to show prejudice. As this case is merely a garden-variety application of *Bagley*, this Court should deny a writ of certiorari on this claim.

III. Petitioner's claim that counsel was ineffective for not calling petitioner as a witness

Petitioner contends in his second issue that counsel was ineffective for denying petitioner the opportunity to testify at trial. Petitioner cites no conflict between the court's decision below and the decisions of any other court; he merely states that the lower court erred in its determination. Certiorari is not necessary to decide this type of commonplace ineffective assistance claim under *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), a standard petitioner does not mention or acknowledge with respect to this claim.

In any case, petitioner's claim would be meritless. Petitioner's trial counsel testified in the post-conviction relief evidentiary hearing that

> Did [petitioner] say, Don't rest the case, I am going to testify? No. Did I discuss with him, whether it be right there at counsel table or prior to that morning or afternoon whether or not he was going to testify? Yes, we discussed it. And the decision was reached that we were done, that we didn't need his testimony, or did we want his testimony.
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> If [petitioner] had insisted that he was going to take

> the stand in spite of any advice I may have given him, then he would have taken the stand. And that is my habit and practice as an attorney ... Would I not have prevented [petitioner testifying] over his vehement wishes, no.

PCR Tr. 17, 71. The post-conviction court found counsel "very credible," PCR L.F. 245, a finding entitled to deference by this Court, *Marshall v. Lonberger*, 459 U.S. 422, 434-35, 103 S.Ct. 843, 74 L.Ed.2d 646 (1983)("Title 28 U. S. C. §2254(d) gives federal habeas courts no license to redetermine credibility of witnesses whose demeanor has been observed by the state trial court, but not by them"). The record thus demonstrates that counsel and petitioner reached an agreement that petitioner would not testify, and that counsel would have allowed petitioner to testify if petitioner had insisted on doing so. Counsel did not prevent petitioner from testifying. This claim simply has no merit and certiorari should be denied on this claim.

IV. Evaluating petitioner's claims *de novo* instead of under AEDPA would not change the result of this case

Petitioner contends in his third issue that the district court used the wrong standard of review in denying his claims of ineffective assistance of counsel and prosecutorial misconduct. Petitioner's argument, basically put, is that the district court improperly construed the state court's determination of procedural bar as a decision on the merits and deferred to that resolution under AEDPA.

With regard to the prosecutorial misconduct claims, petitioner's argument lacks any merit. The district court stated for its standard of review the unremarkable proposition that "prosecutorial misconduct does not merit federal habeas relief unless the misconduct infected the trial with enough

unfairness to render a petitioner's conviction a denial of due process." Pet. App. at 19. This standard requiring petitioner to show prejudice echoes this Court's opinions in *Donnelly v. DeCristoforo*, 416 U.S. 637, 642-43, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974), and *Darden v. Wainwright*, 477 U.S. 168, 180-82, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986), which establish the due process requirements, including prejudice, for prosecutorial misstatements in closing argument, and *Strickler v. Greene*, 527 U.S. 263, 280, 119 S. Ct. 1936, 1948, 144 L. Ed. 2d 286 (1999), and *United States v. Bagley*, 473 U.S. 667, 678, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985), which establish the due process requirements, including prejudice, for the prosecutor's suppression of exculpatory and impeaching evidence. The district court applied this correct standard to petitioner's claims of prosecutorial misconduct. Pet. App. at 20-21. A writ of certiorari is not required on this point.

With regard to the ineffective assistance of counsel claims, the result would not have changed even if these claims were reviewed *de novo* under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). This conclusion flows naturally from the fact that while the magistrate judge decided the claims directly under *Strickland*, Pet. App. at 56-58, the district court gave deference to the state court's determinations under AEDPA, Pet. App. at 14-16, and both courts denied relief.

On the merits, petitioner claims that counsel was ineffective for failing to investigate and present evidence that State's witness Kara Weinstein was intoxicated on the night of the crime, that she was romantically involved with the shooting victim's half-brother, that she had mental problems, and other unspecified impeaching evidence. Pet. Br. at 23.

This claim fails regardless of the deference offered the State court's adjudication. Missouri law is clear that "upon cross-examination on collateral matters for the purpose of impeachment, the party is bound by the answer of the

witness." *State v. Johnson*, 484 S.W.2d 491, 496 (Mo. 1972). Further, no extrinsic evidence is admissible on a collateral matter simply to impeach a witness. *State v. Dunson*, 979 S.W.2d 237, 242 (Mo.App. W.D. 1998). Evidence is not collateral "if the alleged discrepancy involves a crucial issue directly in controversy or relates to 'any part of the witness' account of the background and circumstances of a material transaction, which as a matter of human experience, he would have been mistaken about if his story were true.'" *Id.*, *quoting State v. Williams*, 849 S.W.2d 575, 578 (Mo.App. E.D. 1993). Therefore, under Missouri law, extrinsic evidence may be introduced to impeach a witness' testimony only when the alleged discrepancy relates to the facts in controversy, i.e. the elements of the charged offense, or to the facts and circumstances of the charged crime.[3]

Trial counsel specifically questioned Kara Weinstein about whether she had been influenced by the victim's family to change her story, and she stated "no." Trial Tr. at 291. Trial counsel also specifically inquired about whether Ms. Weinstein was drunk on the night of the crime. Trial Tr. at 311-315. Under Missouri law and federal law, trial counsel could not have asked anything more concerning Ms. Weinstein's intoxication or her relationship with the victim's family and would have been precluded from introducing extrinsic evidence of those events because the events concerned were collateral in that Ms. Weinstein's intoxication and relationships do not have any bearing on the elements of the crime of murder for which petitioner was facing trial. Likewise, with respect to Ms. Weinstein's alleged mental problems, trial counsel could not have put on independent collateral testimony to impeach Ms. Weinstein under Missouri law.

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[3]Federal law is similar in nature. *See* Federal Rule of Evidence 608(b).

Trial counsel cannot be ineffective for failing to investigate or attempt to introduce evidence that is inadmissible under Missouri law because the result of the trial would not have changed based on investigation and attempted presentation of inadmissible evidence. *Strickland v. Washington*, 466 U.S. at 696.

The district court and the magistrate determined that these claims were devoid of merit under AEDPA and under *de novo* review. The courts were correct. Petitioner's claim is devoid of merit, and this Court should deny the petition for writ of certiorari on this point.

Conclusion

For the foregoing reasons, the respondent prays that the Court enter its order denying the petition for writ of certiorari.

Respectfully submitted,

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